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PACIFIC INTER-LINK SDN BHD v. EPA MANAGEMENT SDN BHD

COURT OF APPEAL, PUTRAJAYA
ABDUL AZIZ ABDUL RAHIM JCA
IDRUS HARUN JCA
B NALLINI PATHMANATHAN JCA
[CIVIL APPEAL NO: J-02(NCVC)(W)-982-06-2014]
27 JANUARY 2016

CONTRACT: *Arbitration – Arbitration clause – Default in payment under*
C *contract – Claim for principal payment and late payment interest – Whether claimant entitled to late payment interest – Whether there was arbitrable dispute – Whether 'dispute' between parties fell within ambit of arbitration clause – Whether matter should be referred to arbitration*

The appellant and the respondent had entered into domestic sale and
D purchase contracts for crude palm oil ('CPO'). All the contracts have standard terms and made express reference to the domestic sales contract for Malaysian CPO in bulk issued jointly by Malaysian Palm Oil Association and Palm Oil Refiners Association of Malaysia ('PORAM'). The PORAM terms also contained an arbitration clause ('cl. 16'). The appellant defaulted
E in payment, prompting the respondent to commence an action against the former at the High Court, claiming for the principal sum of RM29,806,502.90 with interest totalling RM4,041,292.14. The appellant settled the payment for the principal sum but failed to settle the interest as it contended that it did not owe the respondent any late payment interest. The respondent argued that the terms in the PORAM handbook was not the only
F document that constituted a binding contract between the parties. The respondent further submitted that the contract between the parties must be read together with, *inter alia*, the invoices which contained a provision for late payment interest chargeable. In accepting the respondent's arguments, the Judicial Commissioner ('the JC') held that, taken collectively, the
G documents showed that the respondent was entitled to claim for late payment interest. Hence, the present appeal. The issue that arose for the court's adjudication was whether the issue as to liability to be charged and to pay late payment interest was a dispute that fell within the ambit of cl. 16 that required reference to arbitration.

H **Held (allowing appeal)**
Per Abdul Aziz Abdul Rahim JCA delivering the judgment of the court:

(1) There were two different interpretations of what constituted the contract between the parties and whether the contract provided for payment of
I interest. The JC had gone into the merits of the matter in order to arrive at his conclusion when His Lordship ought to have determined, firstly, whether the issue as to the payment of interest was a 'dispute' between the parties that fell within the ambit of cl. 16. Therefore, the JC had

adopted the wrong approach by going into an evaluation of the evidence as to the merits of the respondent's entitlement to late payment interest in determining whether there was a dispute within the meaning of cl. 16 of the contracts for reference to arbitration. The High Court order was set aside and the action filed by the respondent at the High Court was struck off. (paras 17, 19, 20 & 21)

***Bahasa Malaysia** Headnotes*

Perayu dan responden telah memasuki kontrak-kontrak jual beli domestik bagi minyak sawit mentah ('CPO'). Kesemua kontrak mengandungi terma standard dan membuat rujukan nyata pada kontrak jualan domestik bagi CPO Malaysia secara pukal yang dikeluarkan oleh Persatuan Minyak Sawit Malaysia bersama-sama dengan Persatuan Penapis Minyak Sawit Malaysia ('PORAM'). Terma PORAM turut mengandungi satu klausa timbang tara ('kl. 16'). Kegagalan perayu membuat bayaran menyebabkan responden memulakan satu tindakan terhadap perayu di Mahkamah Tinggi bagi tuntutan jumlah prinsipal sebanyak RM29,806,502.90 dengan faedah berjumlah RM4,041,292.14. Perayu telah menyelesaikan bayaran jumlah prinsipal tetapi gagal menyelesaikan faedah tersebut kerana mendakwa bahawa ia tidak berhutang apa-apa faedah bayaran lewat. Responden menghujahkan bahawa terma-terma dalam buku panduan PORAM bukanlah satu-satunya dokumen yang membentuk kontrak mengikat terhadap pihak-pihak. Responden menghujahkan lagi bahawa kontrak antara pihak-pihak mesti dibaca bersekali dengan, antara lain, invois-invois yang mengandungi peruntukan tentang faedah yang boleh dikenakan bagi bayaran lewat. Dalam menerima hujah responden, Pesuruhjaya Kehakiman ('PK') memutuskan bahawa, dilihat secara kolektif, dokumen-dokumen menunjukkan bahawa responden berhak menuntut faedah bagi bayaran lewat. Oleh itu, timbul rayuan ini. Isu berbangkit untuk diputuskan oleh mahkamah adalah sama ada isu liabiliti yang dikenakan dan bayaran faedah bayaran lewat adalah pertikaian yang terjumlah dalam ruang lingkup kl. 16 yang menghendaki rujukan kepada timbang tara.

Diputuskan (membenarkan rayuan):
Oleh Abdul Aziz Abdul Rahim HMR menyampaikan penghakiman mahkamah:

(1) Terdapat dua tafsiran berbeza tentang apa yang membentuk kontrak antara pihak-pihak dan sama ada kontrak tersebut memperuntukkan bagi bayaran faedah. Pesuruhjaya Kehakiman telah membincangkan tentang merit-merit hal perkara dalam mencapai keputusan beliau sedangkan beliau sepatutnya memutuskan, pertama, sama ada isu faedah bayaran adalah 'pertikaian' antara pihak-pihak terjumlah di bawah ruang lingkup kl. 16. Oleh itu, PK telah mengguna pakai pendekatan yang khilaf dengan menilai keterangan bagi merit-merit hak responden terhadap faedah bayaran lewat untuk memutuskan sama ada wujud pertikaian

dalam maksud kl. 16 kontrak bagi rujukan timbang tara. Perintah Mahkamah Tinggi diketepikan dan tindakan yang difailkan oleh responden di Mahkamah Tinggi dibatalkan.

Case(s) referred to:

Caltex Oil Malaysia Limited v. Classic Best Sdn Bhd & Ors [2006] 1 LNS 266 HC ***(refd)***

Ellerine Bros (Pty) Ltd And Another v. Klinger [1982] 2 All ER 737 ***(refd)***

First Steamship Co Ltd v. CTS Commodity Transport Shipping SchiffahrtsgesellschaftmbH, The Ever Splendour [1988] 1 Llyod's Rep 245 ***(refd)***

Gaya Electric Supply Co Ltd v. The State Of Bihar AIR 1953 SC 182 ***(refd)***

Gujarat State Co-operative Land Development Ltd v. PR Mankad & Anor AIR 1979 AIR SC 1203 ***(refd)***

London And North Western & Great Western Joint Railway Companies v. JH Billington Ltd (1899) AC 79 ***(refd)***

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***

Niaga Tani Sdn Bhd v. Samarez Holdings Bhd [2002] 7 CLJ 327 HC ***(refd)***

Perangsang Dagang Sdn Bhd v. Tanjung Teras Sdn Bhd & Ors [2008] 2 CLJ 199 HC ***(refd)***

Scott v. Avery [1843-60] All ER Rep 1 HL ***(refd)***

Tan Kok Cheng & Sons Realty Co Sdn Bhd v. Lim Ah Pat t/a Juta Bena [1996] 1 CLJ 231 FC ***(refd)***

Tradax Internacional SA v. Cerrahogullari TAS [1981] 3 All ER 344 ***(refd)***

Legislation referred to:

Arbitration Act 1952, s. 6

Arbitration Act 1940 [Ind], s. 34

For the appellant - S Sivaneindiren & Jeff Ong Sze Ren; M/s Cheah Teh & Su
For the respondent - Yunus Ali, Ishak Sharif & Noor Safarin; M/s Ishak Sharif & Co

[Editor's note: Appeal from High Court, Johor Bahru; Suit No: 22NCVC-218-10-2013 (overruled).]

Reported by Najib Tamby

JUDGMENT

Abdul Aziz Abdul Rahim JCA:

[1] The issue in this appeal is whether there is a dispute between the parties that ought to be referred to arbitration before the respondent could commence the civil action against the appellant at the High Court. The High Court allowed the respondent's (plaintiff below) claim. On appeal to us by the appellant (defendant below), we allowed the appeal and set aside the High Court order with costs. These are our reasons for doing so.

[2] The appellant is a trading company that purchases and sells crude palm oil (CPO) to its clients. The respondent is a company that supplies and sells Malaysian crude palm oil. The appellant and respondent have had business dealings with each other for approximately 12 years.

[3] In the instant appeal the salient facts are: The appellant purchased crude palm oil from the respondent. They entered into domestic sale and purchase contracts for CPO. All the contracts have standard terms and made express reference to the domestic sales contract for Malaysia crude palm oil in bulk issued jointly by Malaysia Palm Oil Association and Palm Oil Refiners Association of Malaysia (PORAM). These sales contracts are usually referred to in the industry as PORAM terms/contracts. However neither the sale and purchase contracts nor the PORAM terms make any reference to chargeable interest on late payment. However in the invoices that were sent to the appellant by the respondent there was a provision for late payment interest chargeable.

[4] Pursuant to the said contracts, the respondent had sold and supplied crude palm oil to the appellant which the appellant had allegedly failed to pay in full. In its suit against the appellant in the High Court, the respondent claimed RM29,806,502.90 as the principal sum owing by the appellant as at 23 September 2013 with interest at 1.5% per month totalling RM4,041,292.14 and continuing until judgment, and a further interest of 5% per annum on the judgment sum from date of judgment until full realisation. Through a series of payments over a period of time, the appellant settled the whole principal sum. The last payment was made on 15 November 2013. But the appellant failed to settle the interest claimed. The appellant contended that it did not owe the respondent any late payment interest. In fact the appellant is questioning the respondent's right to claim interest. That is the real issue between the parties in this case.

[5] However the respondent contended that the PORAM terms found in the PORAM Handbook was not the only document which constituted a binding contract between the parties. The respondent argued that the contract between the parties is contained in several documents (and the PORAM Handbook was one of them) that must be read together. The other documents to be considered are: the domestic sale/purchase contracts for CPO, the invoices, the purchase contracts and the statement of accounts – all these collectively formed the binding contract between the parties. The respondent cited *Perangsang Dagang Sdn Bhd v. Tanjung Teras Sdn Bhd & Ors* [2008] 2 CLJ 199 and *Caltex Oil Malaysia Limited v. Classic Best Sdn Bhd & Ors* [2006] 1 LNS 266.

[6] The learned trial Judicial Commissioner accepted this argument. The learned Judicial Commissioner held that, taken collectively these documents show that the respondent was entitled to claim late payment interest. The reason being the invoice that was sent to the appellant states that interest would be charged for late payment.

[7] In *Scott v. Avery* [1843-60] All ER Rep 1 HL it was held that parties cannot by contract agree to oust the jurisdiction of the courts to deal with their rights under the contract, but a term in a contract which provides that, in the event of a dispute arising, it shall be referred to arbitrators whose

award shall be a condition precedent to any right of action in respect of the matters agreed to be referred, is valid. It was further held that this is so not only where the provision for arbitration relates merely to the quantum of damages due from one party to the other, but also where it is stipulated that other matters, eg, liability, shall be determined in the first instance by arbitrators. In *Scott v. Avery* (*supra*) the dispute was between the assured (the appellant) and the insurers (the respondent) in a claim for loss and damage covered under a policy of insurance. The policy contained a clause (which is similar to cl. 16 in the PORAM terms) that required the issue as to the liability of the insurers to be decided in the first instance by a committee and if any party is not satisfied with the committee's decision it can maintain an action in the court of law to challenge that decision, but not before the matter had been referred to and decided by arbitrators appointed according to the provision of the policy.

[8] The PORAM terms have an arbitration clause – Clause 16 which is in the nature of a *Scott v. Avery* clause. Clause 16 of the contract and s. 1 III 2(iii) of PORAM Handbook reads:

> Clause 16:
>
> Any dispute arising out of this contract, including any question of law arising in connection therewith, shall be referred to arbitration in Malaysia (at the PORAM Secretariat or elsewhere if so agreed), in accordance with the PORAM Rules of Arbitration and Appeal in force at the date of the initiation of the arbitration.
>
> Neither party hereto, nor any persons claiming under either of them shall bring any action or other legal proceedings against the other of them in respect of any such dispute until such dispute shall first have been heard and determined by the Sole Arbitrator/Panel of Arbitrators/Appeal Board (as the case may be), in accordance with the PORAM Rules of Arbitration and Appeal and it is hereby expressly agreed and declared that the obtaining of an award from the Sole Arbitrator/Panel Arbitrators/Appeal Board (as the case may be), shall be condition precedent to the right of either party hereto or of any person claiming under either of them to bring any action or other legal proceedings against the other of them in respect of such dispute.

And

> Section 1 III 2 (iii):
>
> In the case of any dispute other than on quality, the party claiming arbitration shall submit its notice of arbitration to PORAM within one hundred and twenty (120) calendar days after the expiry of the contract shipment period or the bill of lading, whichever is later.

[9] Both the appellant and the respondent are not disputing the fact that they are bound by the above clause on arbitration. However the issue between the parties is whether the issue as to liability to be charged and to pay late payment interest is a dispute that falls within the ambit of the above arbitration clause that requires reference to arbitration.

[10] The respondent's contention is that it was not a dispute to be referred to arbitration within the ambit of the agreed arbitration clause. In fact the respondent says there was no dispute at all. The respondent's claim against the appellant, it was argued, was for a debt due and owing under the contract which the civil court had the jurisdiction to determine and which the appellant did not dispute (at least as to the principal sum). So, it is a debt due and owing under the contract and not a dispute so to speak as envisaged under the said arbitration clause. As to the meaning of 'dispute' the respondent cited before the High Court and before us several cases: In *Niaga Tani Sdn Bhd v. Samarez Holdings Bhd* [2002] 7 CLJ 327, where it was said that a dispute arises where there is disagreement about central issue. In *Gujarat State Co-operative Land Development Ltd v. PR Mankad & Anor* AIR 1979 SC 1203, a dispute is a controversy which postulates the assertion of a claim by one party and its denial by the other. In *First Steamship Co Ltd v. CTS Commodity Transport Shipping Schiffahrtsgesellschaftmbh, The Ever Splendour* [1988] 1 Llyod's Rep 245, it said that there is no dispute if one party is able to demonstrate that the other party has no defence. In *London And North Western & Great Western Joint Railway Companies v. JH Billington Ltd* (1899) AC 79, it was held that if a claim one party has been expressly or impliedly admitted by the other there is not dispute. The respondent also submitted, by relying on the case of *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609, that the appellant never objected, challenged nor questioned the stipulation as to the monthly rate of interest chargeable on overdue accounts appearing at the bottom of the invoices sent to the appellant. In the absence of such objection or challenge it was submitted that the appellant must be taken to have impliedly admitted liability to pay the interest and cannot now when the suit had been filed raised the objection as to the interest payable.

[11] The appellant however argued that a 'dispute' under the said arbitration clause must include any claim which the other party refused to admit or did not pay. The appellant cited *Tradax Internacional SA v. Cerrahogullari TAS* [1981] 3 All ER 344 and *Ellerine Bros (Pty) Ltd And Another v. Klinger* [1982] 2 All ER 737 for this proposition. Thus, it was submitted that since the appellant is objecting to the payment of late payment charges or interest under the contract it is a dispute arising out of the contract between the parties and this dispute should be referred to arbitration pursuant to cl. 16 of the PORAM Handbook to determine whether the respondent can impose interest on late payment and whether the appellant is under a liability to pay the same.

[12] The learned Judicial Commissioner's reasoning for saying that the respondent can claim late payment interest rested solely on the ground that appellant had never questioned the interest imposed in the invoices sent to the appellant and also because there was no objection to the statement of account which also contained an interest claim sent to the appellant prior to

filing of this action by the respondent. Therefore His Lordship held that the imposition of late payment charges or interest was not a dispute but a debt due and owing under the contract. The learned Judicial Commissioner wrote in his ground of judgment as follows:

> (i) I find that the claim on late payment charges imposed *vide* the invoices was not a dispute as envisaged in the arbitration clause but a debt due and owing under the contract between the parties for the following reasons:
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> (i) I have earlier ruled that the Plaintiff was entitled to claim interest for the reasons given by me before this.
>
> (ii) I agree with the contention of the learned counsel for the Plaintiff that the Defendant by their conduct in not objecting, challenging nor questioning the imposition of the interest before the filing of this action must be taken to have impliedly admitted to liability for the Plaintiff's claim for interest.
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> (iii) I further find that failure to raise any objection as to the interest imposed *vide* the invoices sent to the Defendant during the years of dealing had also given rise to a situation of non-query of account stated which had estopped the Defendant from raising any dispute that could have been raised earlier.
>
> (iv) I am satisfied that from the evidence adduced, the issue of dispute of interest on late payments was an afterthought.
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> Based on the aforesaid findings, I ruled that there was no dispute in connection with the contract and therefore the arbitration clause was not applicable in our case and there was no necessity to refer the case for arbitration.

[13] In that regard learned counsel for the appellant submitted that the learned Judicial Commissioner had committed a serious misdirection in law when His Lordship first embarked on determining whether the respondent is entitled to the late payment interest as claimed. In this respect we agree with learned counsel that this issue is the issue on the merits of the respondent's claim.

[14] In this case it is no dispute that the respondent through its solicitors had issued a letter of demand dated 29 August 2013 demanding payment from the appellant the sum of RM30,247,147.18 and to be paid within seven days of the date of the demand letter. The appellant made partial payment of RM441,134.28 and there is balance of RM29,806,052.90 due and still owing to the respondent. The respondent then filed the action to recover this sum as well as the interest on the said sum at rate of 1.5% per month amounting to RM4,041,292.14 as at 23 September 2013. The appellant filed its memorandum of appearance and later filed an application to strike out the respondent's claim. Meanwhile the appellant continued to make payment on the principal sum and had settled the full sum on 15 November 2013. The

appellant never paid any late payment interest as this was disputed. We observe that in the respondent's notice of demand dated 29 August 2013 to the appellant demanding the payment of RM30,247,187.18 no mention of any payment of or chargeable interest was mentioned.

[15] After the appellant had settled the principal sum in full, the appellant wrote to the respondent on 10 December 2013 requesting the respondent to withdraw the suit against it. But the respondent did not do so; instead the respondent wanted to pursue its claim for the interest against the appellant. The appellant then filed an application to strike out the respondent's action on the grounds that the respondent has no cause of action in the light of the *Scott v. Avery* type arbitration clause.

[16] The learned Judicial Commissioner ordered the appellant's striking out application to be heard together with the trial of the respondent's action; and the matter proceeded to full trial. The outcome was that the court gave judgment in favour of the respondent. Hence, this appeal by the appellant.

[17] We also note that the learned Judicial Commissioner had also ruled that the contract between the appellant and the respondent was to be determined by looking at the various documents collectively; not just at the sale and purchase contract, the purchase contract and the PORAM terms. Only by ruling as such, was the learned Judicial Commissioner able to hold that the respondent was entitled to claim the interest. Thus, the learned Judicial Commissioner had gone to the merits of the matter in order to arrive at his conclusion when His Lordship ought to have determined firstly whether the issue as to payment of interest is a 'dispute' between the parties that falls within the ambit of cl. 16, the agreed arbitration clause. It must be noted that the appellant's contention was that the contract was found only in the sale and purchase contract, the purchase contract read together with PORAM terms. The invoices, according to the appellant were never considered as part of the contract. In our view this contention by the appellant is by itself a factor that the Judicial Commissioner ought to have considered in determining whether there was a dispute with the meaning of cl. 16.

[18] Learned counsel for the appellant in his written submission referred to the Federal Court's decision in *Tan Kok Cheng & Sons Realty Co Sdn Bhd v. Lim Ah Pat t/a Juta Bena* [1996] 1 CLJ 231; [1995] 3 MLJ 273, 281. Though in that case the Federal Court was dealing with the issue of stay under a general arbitration clause pursuant to s. 6 of the Arbitration Act 1952, the decision centred on the determination whether there was a 'dispute' within the meaning of the arbitration clause. The Federal Court adopted with approval the approach taken by the Indian Supreme Court in *Gaya Electric Supply Co Ltd v. The State Of Bihar* AIR 1953 SC 182,185 in determination whether there is 'dispute' under s. 34 of the Indian Arbitration Act 1940 (the equivalent of our s. 6 in 1952 Act). The Federal Court in

summarising the approach taken by the Indian Supreme Court said: "when considering an application under s. 6 of the Act, it is no part of the court's function to decide whether the defendant has raised a *bona fide* dispute warranting stay. The strength or weakness of the issues raised by the defendant must await the decision of the tribunal especially chosen by the parties to decide the differences that have arisen". The same principle applies in our case though the issue here is not about stay but about right to claim late payment interest which right is being disputed.

[19] We therefore are of the view that learned counsel for the appellant had correctly submitted that the learned Judicial Commissioner had adopted the wrong approach by going into an evaluation of the evidence as to the merits of the respondent's entitlement to late payment interest in determining whether there was a 'dispute' within the meaning of cl. 16 of the contracts for reference to arbitration.

[20] Is there a dispute in this case? We think so. Learned counsel for the respondent submitted that the late payment interest or charges as pleaded by the respondent relate to trade conducted pursuant to the contracts entered into between the appellant and the respondent. The appellant said the contract does not provide for interest for late payment. The respondent however said that it does because the term was indorsed in the invoices sent to the appellant and the invoices formed part of the contract document. The appellant denies that the invoices was part of the contract. Thus, there are two different interpretations of what constitutes the contract between the parties and whether the contract whichever way it is interpreted provides for payment of interest. With regard to the respondent's contention that it is common practice in Malaysia that in goods sold and delivered cases the seller is entitled to 1.5% interest per month for late payment charges and the appellant's silence in not disputing the interest charged at the first opportunity, is insufficient, in our view, to constitute a clear and unequivocal admission by the appellant of his obligation to pay late payment charges under the contract.

[21] Accordingly, this appeal is allowed with cost of RM30,000 here and below and deposit refunded. The High Court order is set aside. We also make the following consequential order: (i) the action filed by the respondent/plaintiff in the High Court is struck off; and (ii) all monies placed in Bank Rakyat under joint account of solicitors for the appellant and respondent be immediately pay out to the appellant.